92-820

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

ALBERTO FERNANDEZ,
*Petitioner,*

vs.

CHARLES SCULLY, WARDEN, GREENHAVEN CORRECTIONAL INSTITUTION,
*Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Was the petitioner denied his United States Constitutional Sixth and Fourteenth Amendment fundamental right to reasonably effective assistance of state trial counsel where, among other respects, 1) his defense counsel's cross-examination of a recanting principal defense witness was limited to essentially an attempt to avoid any charge of subordination of perjury by defense's counsel's office, 2) following the recantation, defense counsel failed to prepare petitioner to testify on his own behalf despite having three and a half days to do so, and 3) defense counsel subsequently abandoned his client on summation?

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In The
Supreme Court of the United States
October Term, 1992

ALBERT FERNANDEZ,
*Petitioner*,
vs.
CHARLES SCULLY, WARDEN,
GREENHAVEN CORRECTIONAL INSTITUTION,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Alberto Fernandez, respectfully prays that a writ of cirtiorari issue to review the order of the United States Court of Appeals for the Second Circuit denying his motion for the issuance of a certificate of probable cause pursuant to Rule 22(b) of the Local Rules of the United States Court of Appeals for the Second Circuit to appeal the denial of his habeas corpus petition by the United States District Court for the Southern District of New York and dismissing his appeal, when he was denied his Sixth Amendment right to reasonably effective assistance of trial counsel.

## OPINIONS BELOW

The unpublished written order of the United States Court of Appeals for the Second Circuit appears in Appendix A to this Petition. The unpublished endorsed memorandum of the Honorable Richard Owen, Judge, United States District Court for the Southern District of New York, declining to issue a certificate of probable cause for appeal, appears in Appendix B to this Petition. The unpublished endorsed memorandum of Judge Owen

denying the habeas corpus petition appears in Appendix C. The unpublished report and recommendation of the Honorable Kathleen A. Roberts, Magistrate Judge, adopted by the District Court for the Southern District of New York, appears in Appendix D.

## JURISDICTION

The Court of Appeals' order in this matter was dated and filed on August 11, 1992, and is set forth in Appendix A. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 to the Constitution of the United States is set forth in Appendix E. Amendment 14, § 1, to the Constitution of the United States is set forth in Appendix F.

## STATEMENT OF THE CASE

The United States District Court, Southern District of New York, had jurisdiction pursuant to Title 28, U.S.C. § 2254, for this 1990 petition for a writ of habeas corpus by a person in state custody, the petitioner Alberto Fernandez.

The court which after a bench trial found petitioner guilty on March 25, 1985, of four counts of sodomy in the first degree was the Supreme Court of the State of New York, County of Bronx, Honorable John P. Collins, Justice. Petitioner was sentenced by the same court on June 24, 1985.

An appeal was taken by petitioner on the grounds

*inter alia* that he was denied his Sixth Amendment right to reasonably effective assistance of trial counsel, but the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 16, 1986, affirmed the judgment so appealed without opinion in an Order of Affirmance on Appeal from Judgment.

On January 19, 1990, the Honorable Sol Wachtler, Chief Judge of the New York Court of Appeals, denied petitioner leave to appeal to that court upon reconsideration. *People v. Fernandez*, 75 N.Y.2d 812 (1990). (In the interim a 1988 petition for habeas corpus relief was filed in the United States District Court for the Southern District of New York, but dismissed on the grounds of claims not being exhausted at the state level. On the instant 1990 petition, respondent conceded that petitioner had exhausted his claims at the state level.)

Petitioner contends that he was denied effective assistance of trial counsel on a number of grounds:

1) failure to cross-examine adequately the recanting defense witness;

2) failure to prepare petitioner to take the stand;

3) abandoning and conceding guilt of petitioner on summation;

4) failure to obtain psychiatric information on the complainant and petitioner;

5)advice to waive a trial by jury;

5) failure to cross-examine complainant's sister and failure to cross-examine effectively the complainant;

6) failure to request the results of scientific tests;

7) failure to elicit that no marijuana was found in petitioner's apartment;

8) failure to plea bargain effectively;

9) failure to make an opening statement; and,

10) failure to submit a brief in support of a suppression motion.

The trial pitted the word of the complainant, a minor grocery boy, who charged *forcible* sodomy, with that of petitioner, who when he testified admitted to *consensual* sodomy at his apartment on the evening of May 4, 1984. The complainant charged abduction at knifepoint outside petitioner's apartment building, and being struck inside while alone with petitioner. An examining medical doctor testified to no bruises or lacerations on the boy, which was contradicted by his sister, however, as to facial swelling.

The apartment superintendent testified that petitioner came alone carrying groceries into the superintendent's apartment on the night in question, but on cross-examination this was put at the night after May 4, 1984, the complainant had a motive to testify falsely in that he knew that petitioner, an emigre from Castro's Cuba who continued to live in the Bronx neighborhood, had earlier won the New York State Lottery. Martha Diaz, a resident of petitioner's apartment building, testified that she saw the petitioner and the complainant walking toward the building, completely contradicting complainant's allegation that petitioner grabbed him from behind, put a knife to his neck, and forced him into the building and up six flights of stairs in order to have sex with him.

Two days later Ms. Diaz was recalled to the stand by the assistant district attorney and admitted that she never saw the petitioner with the complainant carrying grocery bags, and when asked by the assistant district attorney whether someone asked her to make up that story she indicated that the petitioner had. She also testified that petitioner asked her to get another witness to testify and that he gave her thirty dollars.

The entire cross-examination of Ms. Diaz by petitioner's counsel was limited as follows:

"Q--Miss Diaz, the first day that you came to my office did I ask you pointblank if anybody offered you any money for this? Did I?

A--(Witness nodded her head in the affirmative.)

Q--What did you say?

THE COURT: I didn't get the answer.

COURT REPORTER: She nodded her head yes.

THE COURT: Pardon me?

COURT REPORTER: She nodded her head yes.

THE COURT: All right. The lawyer put a question to you when you came to his office the first day; he asked you whether or not you got any money.

THE WITNESS: If he gave me any money?

THE COURT: Well--

Q--No. Were you offered any money to come in and testify? Did I ask you that in my office?

A--I don't remember.

Q--The next day did an investigator from my office come and speak to you?

A--Yes.

Q--Okay. And did he ask you if anybody had offered you any money?

A--Yes, he asked me.

Q--Okay. And what did you tell him?

A--I told him no.

[DEFENSE COUNSEL]: I have no further questions.

Shortly thereafter on the same day, Thursday, March 21, 1985, upon application of the People, petitioner was remanded to custody.

On Monday, March 25, 1985, petitioner's counsel represented to the court that petitioner was not prepared to take the stand, but called him anyway when the court would not grant him more time. This colloquy appeared

just before petitioner took the stand to give testimony and be cross-examined:

> [Defense Counsel]: Your honor, the only remaining witness we have is the defendant himself. The Court is aware of the fact that I've been down in the pens both Friday and today and quite frankly, Mr. Fernandez is not, in my opinion, prepared at this time to take the witness stand. There is a substantial communication problem, vis-a-vis mostly language, Judge. I'm going to ask the Court's indulgence to grant me more time to spend with my client.
>
> THE COURT: That application is denied.
>
> We recessed on Thursday afternoon with the understanding that the Court would not sit on this case on Friday. I let you have an opportunity to speak with your client. You had Friday, the weekend and this morning. It's now ten minutes after noon.
>
> That application is denied.
>
> (Defendant and counsel confer.)
>
> [Defense counsel]: Defense calls Alberto Fernandez to the stand.

It is to be noted that it was defense counsel who on Thursday had requested time to prepare his client after the critical Diaz recantation and remand of petitioner:

> [Defense counsel]: Judge, I'll reserve my argument and I have a request relative to the timing for the remainder of the case. Since the defendant is now in, I will not have the benefit of an interpreter to prepare him in the event he chooses to take the witness stand except during court hours. The interpreter that I was using, my secretary, is not a person who could be admitted

> into the prison system. Consequently, I would ask the Court to put the case on for tomorrow simply so that my client will be produced here so that Miss Cruz may accompany me tomorrow morning and I may spend some time with him to prepare him and we can conclude the case on Monday.

Notably, cross-examination of petitioner elicited an affirmative answer that he paid Ms. Diaz "to testify and lie" for him.

That portion of the summation given by defense counsel wherein petitioner submits he abandoned his client and duty of loyalty thereto is as follows:

> [Defense counsel]: Yes. May it please the Court, your Honor, this has been a most difficult case, not for just myself, but for Mr. Fernandez because for many months Mr. Fernandez has been wrestling with the fact that he knew he committed a criminal act, but that it had been elevated to something far above and beyond that for which he was actually guilty. As a result in his frustrations, in his apparent blindness to the trust that he should have had in the court, he sought to bring to the court a witness, Martha Diaz, to attest to the fact that he in fact walked into that building with a boy and the boy walked in on his own free will and there was no knife-point abduction. I think that all of us in the courtroom felt at that point in time, regardless of what was to come thereafter, that the defendant had done himself incaparable harm. I ask the Court at this time before looking at the evidence itself, to recognize the frustration of someone placed in a position such as Mr. Fernandez found

> himself in, the background from which he comes and the fact, in and of itself that he sought additional help because of his frustration, that that alone should not be sufficient to convict him, to discredit him beyond recognition. [Emphasis added.]

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: the order below dismissing the appeal conflicts, by implication, with previous decisions of this Court and with the decisions of other Circuits; and this petition presents issues resolved by implication by this Court but not specifically and unequivocably decided by this Court.

This Court has recognized that:

> [c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

*Davis v. Alaska*, 415 U.S. 308, 316 (1974) (requiring that a defendant in a state criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status).

Indeed, this Court has repeatedly stated that "'[t]o say

that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.'" *Smith v. Ilinois*, 390 U.S. 129, 132 (1968) (quoting *Alford v. United States*, 282 U.S. 687, 692-94).

Here the recantation of defense witness Martha Diaz, two days after her previous excalpatory eyewitness testimony, struck a mighty blow to the defense. Yet defense counsel's cross-examination of the recanting Ms. Diaz was limited to essentially an attempt on his part to avoid any charge of subornation of perjury by defense counsel's office. Petitioner submits that contrary to the Second Circuit order below, under these circumstances that he was denied his Sixth Amendment right to reasonably effective assistance of trial counsel within the guidelines of *Strickland v. Washington*, 466 U.S. 668 (1984), although that case does not explicitly and unequivocably decide the issue. "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984)

Following the blow of the recantation testimony inadaquately cross-examined and petitioner's promptly subsequent remand to custody, petitioner also suffered by his trial counsel's failure to prepare him to take the stand despite his having three and a half days to do so. Defense counsel admitted to the court that petitioner was not ready to testify, but when additional time was refused, put him on the stand for testimony and cross-examination anyway.

Petitioner submits that this lapse in preparation, coming

at a critical time with regard to how to deal with the recantation, deprived him also of reasonably effective assistance of counsel, with disasterous results.

As stated in *United States ex rel. Tyrrell v. Jeffes*, 420 F. Supp. 256, 273 (E.D. Pa. 1976), *cert. denied*, 430 U.S. 958 (1977).

> It would be an unwise attorney indeed who would put any witness on the stand without knowledge of his client's testimony. When that witness is the defendant in a serious criminal case, and when the attorney has not been able to learn what his client's testimony would be, incompetence would be demonstrated by putting such a witness on the stand. [Emphasis in original.]

Here trial counsel had not ten months to prepare the petitioner adequately to take the stand after the unexpected recantation of a witness only produced during or on the we of trial.

Petitioner also submits that after having failed to cross-examine adequately the recanting witness and then having failed to prepare him adequately to take the stand, defense counsel distanced himself and abandoned his duty of loyalty to his client on summation. The remarks included counsel's personal opinion that "I think that all of us in the courtroom felt at that point in time [when he sought to bring to the court a witness, Martha Diaz], regardless of what was to come thereafter, that the defendant had done himself irreparable harm."

The Eleventh Circuit has held that an attorney's "attempt to separate himself from his client in closing argument represents a breach of his duty of loyalty to his client

stressed by the Supreme Court" (citing *Strickland v. Washington*, *supra*, 466 U.S. at 688). *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (counsel at sentencing hearing emphasized during closing argument the reprehensible nature of crime and fact that he had reluctantly represented defendant).

The same court has concluded that at a guilt/innocence phase of a trial a defense counsel's expression of personal opinion as to the guilt of his client renders assistance at trial ineffective. *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983).

The Ninth Circuit has explained that a defense counsel's abandonment of his duty of loyalty to his client by assisting the prosecutor creates a conflict of interest. *United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991). "'An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'"' *Id.* [quoting *Osborn v. Shillinger*, 861 F.2d 612, 624 (10th Cir. 1988), quoting *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)].

Where a defense counsel has an interest in exonerating himself which is not consistent with defending his client, ineffective assistance of counsel has been found. *E.g.*, *Utah v. Johnson*, 823 P.2d 484 (Utah App. 1991), and cases discussed therein.

Here it is to be noted that there was no actual eyewitness to the events at issue that transpired within the privacy of petitioner's apartment, other than, of course, complainant and petitioner. Who can be sure that petitioner would have been convicted had not the factfinder been told by defendant's own attorney that he had done himself "irreparable" harm? *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981) (counsel may not stipulate to facts which amount to functional equivalent of a guilty plea, and the

court asked a similar question in finding prejudice).

Accordingly, petitioner submits that the implicit conflicts of the Second Circuit order below with decisions of other Circuits should be reviewed, and that this court should take the opportunity to specifically and unequivocably resolve these issues only resolved by implication in *Strickland v. Washington*, *supra*.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the order of the Court of Appeals in this matter.

Dated: November 6, 1992

Respectfully submitted,

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New York, New York 10019-4701
(212) 586-7074

APPENDIX A

**United States Court of Appeals**
**For The Second Circuit**

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ALBERTO FERNANDEZ,
*Petitioner/Appellant,*

-against-

CHARLES SCULLY, WARDEN GREENHAVEN CORRECTIONAL INSTITUTION,
*Defendant/Respondent.*

---

NOTICE OF MOTION
92-2275

Notice of Motion for a Certificate of Probable Cause

MOTION BY:
PETER ALBERT MCKAY
1350 6th Avenue
Suite 1802
New York, NY 10019
212 586-7074

OPPOSING COUNSEL:
RICHARD SHERIDAN, Esq.
215 East 161st St.
Bronx, NY
212 590-2000

Has consent of opposing counsel:
A. been sought? *Yes*
B. been obtained? *No*
Has service been effected? *Yes*
Is oral argument desired? *Yes*

Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? *No*
B. by firm date of argument notice? *No*
C. If Yes, enter date:_____
Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below? *Yes*
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? *No*
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? *Yes*

---

Brief statement of the relief requested: The issuance of a certificate of Probable Cause Pursuant to Local Rule 22B to appeal the denial of a habeas corpus petition by Judge Owen.
Complete Page 2 of this Form
By: (Signature of attorney) s/ Peter Albert McKay
Appearing for: (Name of party) ALBERT FERNANDEZ
Appellant or Petitioner: *Defendant*
Appellee or Respondent:
Date ISSUED AS MANDATE.
6/11/92-August 12, 1992

ORDER

Before: Hon. Ralph K. Winter, Hon. Roger J. Miner and Hon. Joseph M. McLaughlin, CJJ
IT IS HEREBY ORDERED that the motion be and it hereby is denied and the appeal is dismissed.

Elaine B. Goldsmith, Clerk
By: s/ Arthur Heller
Arthur Heller, Dep. Clerk

Date: 8/11/92

UNITED STATES COURT OF APPEALS
FILED
AUG 11 1992
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

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## APPENDIX B

Fernandez v. Scully
90 Civ. 2192(RO)

ENDORSED MEMORANDUM

*Owen, District Judge:*

Petitioner Alberto Fernandez seeks leave to appeal to this Court's dismissal of his habeas corpus petition on January 29, 1992, which adopted a Report and Recommendation of Magistrate Judge Roberts.

I decline to issue a certificate of probable cause for appeal. The petition does not appear to present "some question deserving of appellate review," *Alexander v. Harris*, 595 F.2d 87 (2d Cir. 1979).

So ordered.

Dated: May 5, 1992
New York, New York

United States District Judge

## APPENDIX C

Fernandez v. Scully
90 Civ. 2192 (RO)

## ENDORSED MEMORANDUM

*Owen, District Judge:*

Petitioner Alberto Fernandez objects to the November 26, 1991 Report and Recommendation of Magistrate Judge Roberts denying his petition for habeas corpus relief.

Fernandez was convicted in New York state court on June 24, 1985 of Sodomy in the First Degree and Unlawful Imprisonment in the First Degree, and was sentenced to the sodomy counts and to a consecutive definite term of one year imprisonment or a $5,000 fine on the unlawful imprisonment count. The Appellate Division unanimously affirmed his conviction without opinion, and Fernandez's application for leave to appeal to the Court of Appeals was denied. Fernandez brought this habeas corpus petition claiming that he was denied effective assistance of trial counsel.

Fernandez raises a variety of examples illustrating the alleged ineffective assistance; I find all his claims to be meritless. His counsel's trial tactics were all acceptable strategic decisions falling within the ambit of reasonable professional assistance as articulated by *Strickland v. Washington*, 466 U.S. 688 (1984). No other basis for objection having been raised and upon a review by me, the Report and Recommendation of Magistrate Judge Roberts, dated November 26, 1991, is hereby adopted and made the order of this Court. Accordingly, Fernandez's petition for habeas corpus relief is denied.

So ordered.

Dated: January 29, 1992
New York, New York

United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

ALBERTO FERNANDEZ,

Petitioner,

-against-

CHARLES SCULLY, Superintendent, Greenhaven Correctional Facility,

Respondent.

---

*REPORT AND RECOMMENDATION*

*TO THE HONORABLE RICHARD OWEN:*

This petition, with an accompanying memorandum of law ("Petitioner's Memo") and appendix containing relevant state court documents, was filed on March 30, 1990, and referred to me for Report and Recommendation on June 29, 1990. Respondent submitted an affidavit ("Resp. Aff.") and memorandum of law ("Respondent's Memo") on October 4, 1990; petitioner's reply brief ("Petitioner's Reply") was filed on December 13, 1990. An evidentiary hearing was held on October 21, 1991.

For the reasons set forth below, I find that the petition is meritless and recommend that it be denied.

### PRIOR PROCEEDINGS

On June 24, 1985, petitioner was convicted, following a non-jury trial, of Sodomy in the First Degree (four

counts) (New York Penal Law Section 130.15(1)) and Unlawful Imprisonment in the First Degree (New York Penal Law Section 135.10); he was sentenced to four concurrent indeterminate terms of imprisonment of from seven to twenty-one years on the sodomy counts, and to a consecutive definite term of one year imprisonment or a $5,000 fine on the unlawful imprisonment count. Resp. Aff. paragraph 5. Petitioner is currently serving this sentence at Greenhaven Correctional Facility. Resp. Aff. par. 4.

On October 16, 1986, the Appellate Division unanimously affirmed petitioner's conviction without opinion. *People v. Fernandez*, 123 A.D.2d 900, 507 N.Y.S.2d 569 (1st Dep't 1986). Petitioner's application for leave to appeal to the Court of Appeals was denied on December 19, 1986. *People v. Fernandez*, 69 N.Y.2d 711, 512 N.Y.S.2d 569 (1986).

On July 27, 1988, petitioner filed a federal habeas corpus petition, which was dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982), because petitioner sought to present claims for which he had not sought review in the New York Court of Appeals. Resp. Aff. pars. 9, 10. Petitioner thereafter sought leave to appeal his unexhausted claims to the New York Court of Appeals, which was denied on January 19, 1990. Resp. Aff. pars. 11, 13. Respondent concedes that petitioner has now exhausted his claims at the state level. Resp. Aff. par. 16.

## THE PRESENT PETITION

Petitioner contends that he was denied effective assistance of trial counsel on the following grounds:

1. Counsel failed to adequately cross-examine the recanting defense witness;

2. Counsel failed to prepare petitioner to testify on

his own behalf;

3. Counsel advised petitioner to waive a trial by jury;

4. Counsel ineffectively cross-examined the complaining witness;

5. Counsel waived an opening statement; and

6. Counsel failed to request psychiatric reports on the complainant and petitioner.

Petition par. 12.

## THE EVIDENCE AT TRIAL

*The People's Case*

On May 4, 1984, Jose Muyet, a fifteen-year-old school boy looking for an after-school job went to the Key Food Supermarket located at 176th Street and University Avenue in the Bronx, where he was hired as a packer-delivery boy (Muyet: A. 150-154, 201).[1] While working that day Jose saw and heard petitioner talking with a cashier in Spanish. Jose, who spoke and understood Spanish, heard the cashier call petitioner "Cuba" (Muyet: A. 154-55, 207). Eventually, petitioner approached Jose and asked him to deliver groceries for a woman, with whom petitioner had been speaking (Muyet: 155-56, 209-10). Petitioner then left the store (Muyet: A. 156). Jose accompanied the woman and delivered the groceries to her apartment (Muyet: A. 156-58, 210).

Meanwhile, petitioner went to his apartment building located at 2075 Walton Avenue in the Bronx and visited his superintendent, Julio Garcia, at approximately 7:00 p.m. (Garcia: A. 296-97). Petitioner was alone and carried his own groceries when he visited Mr. Garcia (Garcia: A. 297).

1. Numbers preceded by "A" refer to the pages contained in the appendix submitted by petitioner.

After Jose delivered the woman's groceries, he started to return to the supermarket (Muyet: A. 159). Enroute, Jose saw petitioner alone in the courtyard of a building, located near where Jose had made his last delivery (Muyet: A. 159, 162, 217). As Jose passed petitioner, petitioner grabbed him and pressed his knife to the boy's throat (Muyet: A. 160, 218). Keeping his knife to Jose's neck, petitioner pulled the struggling boy and forced him into the building (Muyet: A. 161, 164, 219). As petitioner dragged Jose up the stairway he offered the boy fifteen dollars to have sex with him, but Jose refused (Muyet: A. 163, 236-37, 242).

Petitioner then forced Jose into this apartment and locked the door with a chain and a bolt lock (Muyet: A. 164-65). Inside, petitioner offered Jose a marijuana cigarette, but the boy refused it (Muyet: A. 166). Then petitioner again propositioned Jose, offering him fifteen dollars if the boy would have sex with him. When Jose again refused, petitioner began hitting the boy on his head and face (Muyet: A. 163, 166-68). Jose tried to move away but petitioner kept beating him, finally forcing the boy into his bedroom (Muyet: A. 167-68).

In the bedroom, Jose moved towards the window in hopes of escaping but petitioner continued slapping him (Muyet: A. 168, 227). Petitioner then began to strip and kept repeating to the boy "please fuckie with me" (Muyet: A. 169). Petitioner threw Jose on the bed and began stripping the struggling boy (Muyet: A. 171). Petitioner then took a jar of vaseline, threw it towards the boy and told him to "put it on" (Muyet: A. 171). When Jose refused, petitioner coated his fingers with vaseline and inserted them into the boy's rectum (Muyet: A. 172-73). Petitioner Petitioner then applied vaseline to his penis, began to masturbate and then forced his penis into the screaming boy's rectum, while placing his hand across the boy's mouth in an attempt to silence him (Muyet: A. 173-74). After anally sodomizing Jose, petitioner performed fellatio on the

boy (Muyet: A. 174). Petitioner tried to force his penis into Jose's mouth but the boy refused to open his mouth (Muyet: A. 174). After this ordeal, Jose waited until petitioner appeared to be sleeping and then attempted to escape, but petitioner forced the boy back on the bed (Muyet: A. 175). Again petitioner sodomized Joe by inserting his penis into the boy's rectum, as the boy screamed (Muyet: A. 176).

Next, petitioner looked a number up in his phone book and phoned someone, telling that person to come over (Muyet: A. 178-79). While petitioner spoke on the phone, Jose ran from the apartment half nude and crying (Muyet: A. 179-80). As Jose ran petitioner warned the boy if he returned with anyone, petitioner would kill Jose's family (Muyet: A. 179). Despite this warning, Jose immediately went home and told his sisters Barbara and Cynthia Persaud that he had been raped (Muyet: A. 181; Persaud: A. 268-69). Shortly thereafter, Jose's mother arrived home and was told of the sexual attack on her son (Muyet: A. 184).

While enroute to the hospital, Jose showed his family where petitioner lived. Jose's brothers wanted to confront petitioner but Jose wanted the police to handle it (Muyet: A. 184-85, 253; Persaud: A. 269).

Dr. Anne Burrowes, who treated Jose at Bronx Lebanon Hospital that night he was assaulted, opined that the boy was "very, very upset," and his anal area was bruised (Burrowes: A. 288-89). Dr. Burrowes took swabs of Jose's anal area[2] and diagnosed that the boy had been sexually assaulted (Burrowes: A. 290). On cross-examination, Dr. Burrowes testified that she did not notice any "rashes or bruises or lacerations on the back or other parts of his body." A. 293. Dr. Burrowes also acknowledged on cross-examination that she had no way of

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2. Petitioner agreed to stipulate that the swabs Dr. Burrowes took from Jose's anal area tested positive for the presence of spermatozoa (A. 300).

telling whether penetration had occurred with or without the complainant's consent. A. 294. While Jose was being treated at Bronx Lebanon Hospital he spoke with the police (Muyet: A. 186-87). The next day, Jose was treated again at Fulton Hospital (Muyet: 186). Jose's penis hurt for a couple of days, he felt pain in his rectal area for a couple of weeks and every time the boy walked his rectum hurt (Muyet: A. 185-86).

The day after the assault, Jose again spoke with the police and told Police Officer Sean O'Toole who his assailant was and showed the officer where petitioner lived (Muyet: A. 187-88; O'Toole: A. 271, 280).

Officer O'Toole went to petitioner's apartment on May 6, and interviewed him with the assistance of a neighbor, Miguel Cabrera, who acted as an interpreter (O'Toole: A. 273). After petitioner was informed of the allegations against him, he said he did not have sex with the boy but merely served him soda and cookies after the boy delivered groceries to his apartment (O'Toole: A. 273-74).[3] While in petitioner's apartment, Officer O'Toole recovered, with petitioner's consent, three knives and a picture from a news clipping[4] (O'Toole: A. 274). Officer O'Toole then arrested petitioner, and later that day Jose identified him in a line-up (Muyet: A. 188-89; O'Toole: A. 272). Jose also identified a folding knife as the knife petitioner pressed to his throat during the attack (Muyet: A. 189-92; O'Toole: A. 274-76; People's Exhibit One: A. 275).

Officer O'Toole also seized a telephone book and two yellow metal chains from petitioner's apartment

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3. Petitioner repeated these assertions twice at the precinct when he was questioned (O'Toole: 280).

4. The news clipping reported petitioner's winning the lottery.

(O'Toole: A. 276-77). Jose recognized the chains as those worn by petitioner during the attack and the telephone book as the one petitioner used that night (Muyet: A. 193-95; O'Toole: A. 278).

*The Defense*

Petitioner's friend, Roberto Quevedo, testified that on May 5, 1984, petitioner phoned him to discuss the card the police left. Quevedo claimed he phoned the police on petitioner's behalf, but he could not recall which precinct or the name of the person with whom he spoke (Quevedo: A. 347-49).

Martha Diaz initially testified that she saw petitioner and a young boy fitting the description of Muyet, both carrying groceries, walk up to the apartment building where she and petitioner lived (Diaz: A. 305, 324-25). Diaz said she only discussed her observation with petitioner the Wednesday before his trial began (Diaz: A. 312-13, 325, 335). Diaz also claimed she was afraid to tell the police about what she allegedly saw (Diaz: A. 324-332).

A day after giving her initial testimony, Diaz retook the stand and testified that her prior testimony was a lie (Diaz: A. 354). Diaz now testified that she never saw petitioner on the evening of May 4, 1984 (Diaz: A. 354-55). Diaz said petitioner told her to lie and promised to "help" her if she did so (Diaz: A. 358). Diaz testified that petitioner gave her thirty dollars to testify and brought her a new dress to wear to court, on the day she initially testified (Diaz: A. 360, 362). Diaz claimed petitioner told her what to say when she first testified, and traveled with her to and from the courthouse (Diaz: A. 356-57, 359). Diaz further testified that petitioner asked her to get him another witness who would lie for him at trial (Diaz: A. 359).

Petitioner, Alfred Fernandez, admitted that he paid Diaz to lie for him and told her what to say (Fernandez: A.

395-96). Petitioner also admitted that he had sodomized Jose, but claimed the boy consented to having sex with him (Fernandez: A. 379-80, 382-83). Petitioner denied hitting Jose and denied phoning anyone while Jose was in his apartment (Fernandez: A. 385, 388, 400). Petitioner further claimed he did not carry or use a knife against Jose on May 4, 1984 (Fernandez: A. 389-90). Petitioner also denied that he had visited Mr. Garcia on the evening of May 4, 1984 (Fernandez: A. 395).

*THE EVIDENCE PRESENTED AT THE HABEAS HEARING*

At a hearing held on October 21, 1991, petitioner presented the testimony of his trial attorney, Benjamin Heinrich.

Heinrich was admitted to practice law in New York in 1971. H. 3, 70. Heinrich was employed as an attorney in the Legal Aid Society Criminal Appeals Bureau from 1970 to 1974. H. 3. He continued to work for the Legal Aid Society as a senior trial assistant in the Bronx from 1974 through 1980. H. 3-4. Since 1980, he was practiced primarily in the area of criminal defense, and at the time of the habeas hearing had tried over 200 cases. H. 70-71.

Heinrich was retained by petitioner to represent him on sexual charges, including sodomy by force. H. 4. Although Heinrich is not fluent in Spanish, he had someone in his office who spoke Spanish and could serve as an interpreter whenever Heinrich met with petitioner. H. 4-5, 72. Between petitioner's arrest and the trial, Heinrich met with petitioner at his office literally "dozens" of times. H. 5, 71. He also twice visited petitioner at his apartment at 2075 Walton Avenue, along with a Spanish-speaking investigator, in order to observe the physical layout of the

apartment and the surrounding area. H. 6-9; *see also* H. 72-73. Heinrich also spoke with residents of other apartments in petitioner's building, and visited the Key Food grocery store where the complainant allegedly first saw petitioner. H. 7-8, 15-16. Although Heinrich was inclined to believe petitioner's version of the events, he and the investigators determined that the complainant's version was "not impossible." H. 11-12.

Heinrich was aware that petitioner was a *marielietos,* who had been incarcerated in Cuba. H. 17. Petitioner told his Heinrich that he had been imprisoned on at least one occasion for stealing some chickens. H. 17. Heinrich did not know whether petitioner had been imprisoned for political crimes against the Castro regime. H. 17-18.

Heinrich did not think it was necessary to have petitioner evaluated by a psychiatrist. Although petitioner "had to have the system explained to him, and he may have had a hard time accepting some factors, *** he did not seem like a crazy person." H. 18. Heinrich acknowledged that petitioner was "defensive" about his homosexuality, but did not believe that this required psychiatric evaluation. H. 18-19; *see also* H. 74-75. Heinrich observed that if he had thought psychiatric evaluation was appropriate, petitioner had the money to employ a psychiatrist. H. 19.

Heinrich testified that he engaged in lengthy plea negotiations on behalf of petitioner. H. 21; 75-76. These negotiations included representatives of the complainant, who intended to file a civil action against petitioner. H. 22-23, 81. The complainant's representatives insisted that petitioner do at least six months in jail and pay $300,000 in "restitution." H. 22. Heinrich discussed the possible disposition of the case with the Assistant District Attorney assigned to try the case, as well as his supervisor. H. 81.

The District Attorney's Office "didn't really care" what disposition was reached, as long as it was acceptable to the complainant. H. 22, 77.

Based upon these negotiations, and conferences with the trial judge, Heinrich concluded, and petitioner advised that there was a strong possibility that he would be convicted after trial of engaging in an act of sodomy with a 15 year old, but not by force, which was an E felony, carrying a sentence of one and one-third to four and one-half years. H. 23-25. Heinrich also advised petitioner of the possibility that he would be convicted of the B felonies, carrying a maximum of eight and one-third to twenty five years. H. 25. Petitioner, however, rejected any offer that included jail time. H. 22, 24; *see also* 76-77.

With respect to his decision to recommend that petitioner waive a jury, Heinrich testified that he considered the nature of the case, noting that in certain sex cases the judge might arise in the mind of the jury, especially if petitioner decided to present a consent defense. H. 26; *see also* H. 25-28, 77-78. Heinrich testified that the trial judge was "generally considered to be a very down-the-road, middle-of-the-rooad jurist, who we felt gives a fair trial and who has been known to acquit or give what they call lesser charges as a sole trier of the fact." H. 28. Heinrich was also concerned about prejudice against Cubans because of the activities of Cuban gangs in the Bronx, composed of *marielietos*. H. 28.

Heinrich testified that he attempted to obtain the records of complainant's psychiatric treatment, but the court denied his application because the complainant did not see a psychiatrist until after the event in question. H. 32, 37, *see also* 90-91. Heinrich could not recall whether the judge examined the complainant's psychiatric records *in camera*. H. 32, 91. Heinrich did not recall whether he questioned the complainant about psychiatric treatment. H. 65.

Heinrich arranged for petitioner to be tested by a polygraph expert, who concluded that petitioner was

truthful in his denial of the use of force, but the judge refused to admit the results into evidence. H. 38-40.

With respect to Martha Diaz, the witness who recanted her testimony on behalf of petitioner, Heinrich testified that he had serious dobuts about her "authenticity" when she first came forward, because he had never heard about her prior to the eve or middle of trial. H. 47, 83-84. Heinrich in fact sent an investigator to visit her "to find out whether or not there were impossibilities in her story." H. 47, 84. Although she made a poor appearance, Heinrich called her as a witness because "we couldn't find any reason not to put her on; and especially since Mr. Fernandez was quite insistent that we do so." H. 48, 83-85. When Diaz recanted her testimony, Heinrich did not cross-examine her regarding the circumstances under which she came to change her testimony because "she was like a loaded gun. We were afraid of her coming out with admisssions made by Mr. Fernandez to her." H. 48, 85-86. He did not think the judge would be impressed by questions designed to elicit that the District Attorney threatened to charge Dias with perjury and felt that "the risk of drawing out admissions on her part with conversations she had with Mr. Fernandez was a greater risk. It was damage control at that point." H. 50; *see also* H. 52-53. Heinrich denied that he was merely "covering himself" by questioning Diaz about her prior statements to him. H. 50-51.

With respect to his overall defense strategy, Heinrich testified that he hoped he could sufficiently discredit the complainant's account of the incident "that the judge might never have to reach an issue as to whether or not it would be a lesser included offense or the E felony." H. 40-41, 42. Heinrich believed, however, that it might become necessary to present a consent defense, which is why Heinrich had sent petitioner to a polygraph expert. H. 56; *see also* 58. Because he did not want to commit himself to

a particular defense until he could evaluate the testimony of the complainant, and because the judge was already familiar with the case from his participation in plea negotiations, Heinrich chose not to make an opening statement.[5] H. 58-59, 79-80. At some point during the trial Heinrich

> made a determination that we would have to go forward with the consent defense because the prosecution's case stood a reasonable chance of success in terms of the Court accepting the credibility of the [complaining] witness. At that point in time, we decided to engage that which we obviously had prepared, the consent [defense].

H. 41, 42, 58-59.

Heinrich testified that during the months preceding the trial, petitioner had been prepared to testify many times. H. 54, 86; *see also* 81-82. Heinrich told the judge that petitioner was not prepared to testify as a "tactic" because petitioner was "nervous" and "distracted" and Heinrich "thought he needed an opportunity to calm down, to tone down, to come back down to earth," and to improve his demeanor on the witness stand. H. 54-55, 56-57, 86-87.

Heinrich acknowledged that having chosen to present a consent defense, his summation "[gave] the jduge a conviction on the E felony." H. 68, 90. Heinrich also

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[5] Similarly, he did not cross-examine the complainant about his contemplated civil suit because "[t]hat was a factor that Judge Collins was very well aware of." H. 63-64, 80.

acknowledged in his summation petitioner's admission that he paid Diaz to testify falsely, but attempted to convince the judge "the fact that he had bought the witness did not in and of itself [condemn] him to a B felony conviction * * *." H. 68, 69, 89-90.

Petitioner did not testify or otherwise controvert the facts to which Heinrich testified.

## DISCUSSION

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel has two components. First, petitioner must show that his attorney's performance was deficient, *i.e.*, that "counsel's representation fell below an objective standard of reasonableness," and that counsel's acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 687-88. Judicial review of an attorney's performance must be "highly deferential," and the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. A defendant must overcome the presumption that the challenged action of his counsel "might be considered sound trial strategy." *Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *accord Strickland*, 466 U.S. at 689. The court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. Second, petitioner must show that his attorney's deficient performance prejudiced the defense, *i.e.*, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

*Cross-Examination of Recanting Defense Witness*

Petition claims that he was denied effective assistance of counsel because Heinrich failed to conduct a vigorous cross-examination of the recanting witness, Martha Diaz. Petition at 5; Petitioner's Memo at 9-23; A. 490-95. Petitioner complains that Heinrich limited his cross-examination of Diaz to questions about prior statements that Diaz made to Heinrich in order to "cover himself," presumably with respect to any concern that Heinrich himself was involved in suborning perjury. Petitioner also complains that his attorney failed to cross-examine Diaz about the circumstances under which she came to change her testimony.

This claim is meritless. First of all, Heinrich's cross-examination was clearly designed not only to "cover himself," but also to emphasize that Diaz had given a prior *consistent* statement. More importantly, Heinrich was understandably concerned that a more aggressive cross-examination might have elicited damaging admissions about the crime itself. His decision to focus on "damage control" was reasonable under the circumstances and certainly within the range of competent legal assistance. *See United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987), *cert. denied*, 484 U.S. 958 (1987) (decisions whether to engage in cross-examination, and if so to what extent and in what manner are strategic in nature).

*Preparation of Petitioner to Testify on His Own Behalf*

Petitioner claims that Heinrich failed to prepare him to testify on his own behalf. Petition at 5; Petitioner's Memo at 6 n.3., 23-30; A. 478. This claim is based solely upon Heinrich's statement to the court just prior to petitioner's testimony that petitioner "is not, in my opinion, prepared at this time to take the witness stand." A. 377-78. Heinrich explained at the habeas hearing that petitioner had in fact

been prepared to testify many times over the ten months between his arrest and the trial. Heinrich sought more time because petitioner was upset and Heinrich felt that petitioner's demeanor would be more impressive if he had an opportunity to calm down. I credit Heinrich's testimony regarding the extent of petitioner's preparation and the circumstances underlying his statement to the court. Accordingly, I find that his decision to put petitioner on the stand was reasonable and professionally competent.

*Waiver of Jury*

Petitioner claims that he was denied the effective assistance of counsel because Heinrich recommended that he waive a jury. Petition at 5; Petitioner;'s Memo at 7 n.3., 40-41; A. 483-84. This claim is meritless. Heinrich testified that he recommended that petitioner waive a jury for several reasons. First, Heinrich was concerned about anti-Cuban prejudices based upon gang activity by *marielietos*. Second, Heinrich believed that a jury might be unfairly prejudiced against petitioner because the case involved allegations--and potentially petitioner's admission--of homosexual sodomy. It is clear that Heinrich carefully considered the pros and cons of a jury trial, and that he reasonably determined that petitioner's interests would best be served by waiving a jury and proceeding before a judge, whom Heinrich knew to be fair minded. *See also* Respondent's Memo at 17-18. Under the circumstances of this case, I find that Heinrich's recommendation constituted "sound trial strategy." *Michel*, 350 U.S. at 101.

*Cross-Examination of Complaining Witness*

Petitioner claims that Heinrich failed to conduct a vigorous cross-examination of the complainant. Petition at 5; Petitioner's Memo at 7 n.3, 31-39; A. 486-89.

Petitioner claims that Heinrich

> ineffectively cross-examined the complaining witness. At Mr. Fernandez' trial, the complainant testified that after Mr. Fernandez' allegedly placed a knife to his throat, Mr. Fernandez then offered him $15.00 to have sexual relations with him. Furthermore, after alleging sex by force with Mr. Fernandez the complainant testified that he escaped through a door left open by Mr. Fernandez. This improbable story was never followed up in cross-examination.

Petition at 5. Petitioner also complains that Heinrich's cross-examination of the complainant gave the complainant an opportunity to repeat his direct testimony. Petitioner's Memo at 36.

Decisions whether to engage in cross-examination and if so to what extent and in what manner are strategic in nature. *Nersesian*, 824 F.2d at 1321. Having reviewed the complainant's testimony, I conclude that Heinrich's decision not to conduct a more agressive cross-examination was well "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also* Respondent's Memo at 15-16.

*Waiver of Opening Statement*

Petitioner claims that Heinrich "mistakenly waived the opportunity to make an opening statement, and thus failed to take the opportunity to acquanit the [fact-finder] with his theory of defense." Petition at 6; Petitioner's Memo at 7 N.3.; 45-46; A. 484. As Heinrich testified, however, the trial judge was fully familiar with the facts of the case

based upon his participation in plea negotiations. Moreover, for strtegic reasons, Heinrich did not wish to commit himself to a particular defense at the outset of the trial. *See Nersesian*, 824 F.2d at 1321. Under these circumstanaces, Heinrich's decision to waive an opening statement was well within "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

*Failure to Request Psychiatric Reports on Petitioner*

Petitioner claims that he was denied effective assistance of counsel because Heinrich failed to have petitioner examined by a psychiatrist. Petitioner's Memo at 6, n.3, 42, 44-45; A. 475-76. This claim is meritless. Heinrich testified that there was nothing about petitioner's behavior or emotional history that suggested the need for such a psychiatric examination. The only ground cited by petitioner's current counsel are petitioner's "shame" about his homosexuality. Given the facts known to Heinrich, and the absence of any history of emotional disturbance, Heinrich's failrue to obtain a psychiatric examination of petition cannot be considered professionally incompetent.

*Failure to Obtain Psychiatric Information about the Complainant*

Petitioner argues that he was denied effective assistance of counsel because Heinrich failed to request complainant's psychiatric treatment records pursuant to NYCPL § 240.20(1)(c). Petition at 6; Petitioner's Memo at 7 n. 3; A. 478. Section 240.20(1)(c) provides that upon demand the presecutor must make available to the defendant

> [a]ny written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment,

> relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial * * *.

N.Y.C.P.L. § 240.20 (1)(c). This provision is plainly inapplicable since the complainant in this case was not examined at the request of a public servant and his psychiatrist was not a witness for the prosecution. Notwithstanding the lack of entitlement under § 240.20(1)(c), Heinrich recalls that he did in fact request the complainant's psychiatric records, but that the court denied his request because they related solely to the complainant's post-incident treatment. H. 32, 37-38, 91.

Petitioner further contends that he was denied effective assistance because Heinrich never asked the court "to conduct a psychiatric examination of the complaining witness either before trial or during his cross-examination of the complainant." Petition at 6; Petitioner's Memo at 43-44. Petitioner acknowledges that there is no statutory authority for such an examination, and that under New York law, a court may order such an examination only "where substantial showing of need and/or justification outweighs the risk of harassment of the witness or the invasion of his or her right to privacy." Petitioner's Memo at 43 (citations omitted). Petitioner cites no facts that would constitute the required "substantial showing." Moreover, in view of the judge's view that the complainant's psychiatric records were inadmissible, (*see* H. 32, 37-38, 91), it is virtually certain that he would have denied any request for a psychiatric examination.

Finally, petitioner also complains that Heinrich failed

to pursue questioning of the complainant regarding psychiatric treatment. Petitioner's Memo at 35; A. 479. At the outset of Heinrich's cross-examination of the complainant, the following exchange occurred:

BY MR. HEINRICH:

Q. Mr. Muyet, have you been seeing a psychiatrist?

A. Yes, sir.

MR. RYAN [ADA]: Judge, I'm going to object to any further inquiry on this subject. I request a Side Bar.

THE COURT: Overruled, Mr. Ryan.

Q. And, who is the psychiatrist you have been seeing?

MR. RYAN: Objection, your Honor.

THE COURT: Sustained. When did you first begin seeing a psychiatrist?

THE WITNESS: I'm not sure the exact, but after--a couple days after this happened.

THE COURT: Had you ever seen a psychiatrist before this incident occurred?

THE WITNESS: No, sir.

Q. And, how often would you say you go to see the psychiatrist?

MR. RYAN: Objection, your Honor --

THE COURT: Sustained.

MR. RYAN: --to any further inquriy . . .

THE COURT: I have heared [sic] enough on that issue now, and I will be able to hear argument on it later. I suggest you go on to something else, and we can come back to that. A. 195-96. There is no further reference to this issue in the record. However, in light of the judge's ruling on the complainant's psychiatric records, I find there is little likelihood that he would have permitted further questioning in this area.

In sum, I find that Heinrich' efforts to obtain information regarding the complainant's psychiatric history

were professionally reasonable under the circumstances.

*Miscellaneous Claims*

Petitioner raises several other complaints about Heinrich's representation that are not set forth as specific grounds for relief in the petition. These include 1) conceding petitioner's guilt in summation (Petitioner's Memo at 33; A. 498); 2) failure to submit a brief in support of a suppression motion (Petitioner's Memo at 6 n.2; A. 466-74); 3) failure to request the results of scientific tests (Petitioner's Memo at 6 n.3; A. 476-78); 4) failure to elicit that no marijuana was found in petitioner's apartment (Petitioner's Memo at 7 n.3; A. 478; and 5) failure to effectively plea bargain (Petitioner's Memo at 7 n.3; A. 485). I find that these claims are meritless and/or reflect strategic decisions that fall within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

## CONCLUSION

I find that the petition is without merit and recommend that it be denied.

Pursuant to 28 U.S.C. §636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Richard Owen, Room 2903, and to the chambers of the undersigned, Room 631. Any requests for an extension of time for filing objections must be directed to Judge Owen. Failure to file objections may result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 57-59 (2d Cir. 1988); *McCarthy v. Manson*,

714 F.2d 234, 237-38 (2d Cir. 1983).

DATED: New York, New York
November 26, 1991

KATHLEEN A. ROBERTS
United States Magistrate Judge

## APPENDIX E

## AMENDMENT 6 TO THE CONSTITUTION OF THE UNITED STATES

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

## APPENDIX F

## AMENDMENT 14, SECTION 1, TO THE CONSTITUTION OF THE UNITED STATES

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."